STATE OF MICHIGAN

COURT OF APPEALS

RENEE STANTON and MICHAEL STANTON,

Plaintiffs-Appellants,

v

FITNESS MANAGEMENT CORPORATION,

Defendant/Third-Party Plaintiff-Appellee,

and

K & C LANDSCAPING, INC.,

Defendant-Appellee,

and

CITY TRANSFER COMPANY,

Third-Party Defendant-Appellee.

UNPUBLISHED
August 17, 2006

No. 267623
Oakland Circuit Court
LC No. 04-061433-NO

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal from an order granting defendant/third-party plaintiff Fitness Management Corporation's motion for summary disposition, in which third-party defendant City Transfer Company joined. Defendant K & C Landscaping had previously been granted summary disposition. Plaintiffs challenge only the grant of summary disposition to Fitness Management and City Transfer. We affirm.

As an independent contractor of City Transfer Company, plaintiff Renee Stanton made a delivery to and picked up packages from Fitness Management at approximately 11:30 p.m. on January 16, 2004. Plaintiff had been given a key to use for deliveries and pickups. She slipped and caught herself on the way into the building with her delivery, and while returning to her van with two large, heavy boxes, she slipped and fell on a sloped area that was covered with ice. Plaintiff's expert averred that snow and ice was piled up next to the sloped cement pad where she fell, and that when it melted the water accumulated on the pad and then froze. He also averred

that the situation was further complicated by the run off during daytime hours from defective gutters. Plaintiff testified that she was paid $450 weekly, but that she would not get paid unless she made all pickups and deliveries. She claims that she called her dispatcher after she was hurt and was told that unless she finished her deliveries she would not be paid.

Plaintiff concedes that the icy condition was open and obvious, but maintains that a special aspect existed since she had no choice but to enter and exit via the only doorway available to her. Further, she claims that the area was unreasonably dangerous because of exacerbation of the problem by partially plowing and then failing to salt, melting and refreezing, and the gutter problem. She argues that the trial court erred in concluding that there was no genuine issue of material fact as to whether a special aspect made the situation unreasonably dangerous.

We review a trial court's grant of summary disposition de novo. *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. The trial court must view all the evidence submitted in the light most favorable to the party opposing the motion to see if it establishes a genuine issue regarding any material fact, which would preclude judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

In *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592-593; 708 NW2d 749 (2005), this Court summarized the law pertaining to special aspects of an open and obvious condition:

> Because the icy conditions here were open and obvious, defendant would have no liability in the absence of "special aspects" that "make a risk of harm unreasonable nonetheless," irrespective of the specific kind of negligence alleged. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 498; 595 NW2d 152 (1999), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). "Special aspects" exist if the condition "is effectively unavoidable" or constitutes "an unreasonably high risk of severe harm." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). However, the risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies. *Id*. at 519 n 2. An open and obvious accumulation of snow and ice, by itself, does not feature any "special aspects." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332-333; 683 NW2d 573 (2004).

In *Lugo, supra* at 519, the Court clarified that the "special aspect" must create "a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ."

Plaintiff argues that the slippery area represented a special aspect because she was obligated to face it in order to enter and exit the building and perform her contractual obligation. We disagree. Plaintiff was in control of her own actions and was aware of the conditions before encountering them. There may have been negative consequences for her had she chosen to avoid the danger by not entering the building, but that does not change the fact that she had a choice. Would she have been obligated to enter a burning building in order to make the pickup? The point being that the underlying principle of the open and obvious doctrine is that once a visitor is aware of a danger, it is their responsibility to determine whether to face it or avoid it. Plaintiff could have chosen to avoid it. That defendant City Transfer may have imposed unreasonable

demands on plaintiff which affected the choice she made does not change the fact that she had a choice. Therefore, we cannot agree that she was obligated to face the danger upon entering the building.

We also are not persuaded that a special aspect is presented because, once she was inside the building, she had no choice but to face the danger in order to exit the building. Plaintiff's reliance on *Lugo, supra* at 518, is misplaced. *Lugo* does offer the example of a customer wishing to exit a store who must face a pool of standing water at the only exit, rendering encountering the obstacle unavoidable. The difference here is that plaintiff was aware of the danger before entering the building in the first place. The fact that, once she chose to encounter the danger and enter the building she would have to face the danger a second time in order to exit the building, does not change the analysis. At the time plaintiff discovered the danger, she did have a choice to enter or not. Plaintiff's position might have merit if she was unaware of the danger before and during her entrance to the building and only discovered it once she was preparing to exit the building. In such a situation, it might be said she had no choice but to encounter the danger. But under the facts of this case, plaintiff discovered the danger before she made the decision to enter (and thereby the decision to face the danger upon exiting).

In short, the danger was avoidable and plaintiff, after discovering the danger, chose to face the danger. The fact that the alternative she faced was negative because of the requirements of City Transfer, represents an "idiosyncratic reason" that plaintiff brought to the situation that is immaterial to the application of the open and obvious doctrine. *Lugo, supra* at 518 n 2. Accordingly, the trial court properly applied the open and obvious doctrine and granted summary disposition in favor of defendant Fitness Management.

Affirmed. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Bill Schuette